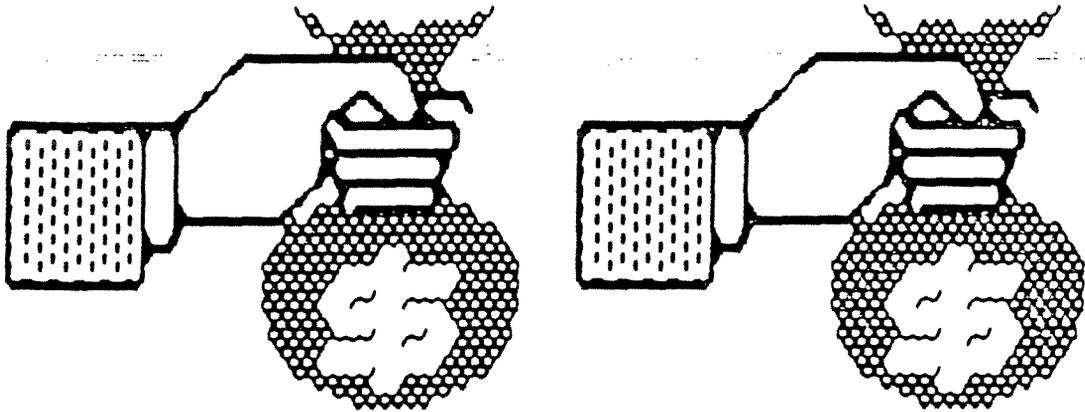


Winning Claims for Back Pay



A REPORT BY:

JEFF KEHLERT

National Business Agent
representing clerks in
Your Region

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Memorandum

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From the Office of JEFF KEHLERT
National Business Agent
Clerk Division
Eastern Region

WINNING CLAIMS FOR BACK PAY

TO:

Dear Brothers and Sisters:

SUBJECT:

This report's purpose is to package the strategy we can use to obtain monies owed to the membership through our Collective Bargaining Agreement within six years of the date the United States Postal Service improperly withheld, collected, reduced or denied pay or benefits.

The regulations governing our entitlement to back pay and the method for pursuing claims for back pay are included under Article 19's Employee and Labor Relations Manual, Part 436¹, which states in part:

436 Back Pay

436.1 Corrective Entitlement

436.11 An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and employment benefits which the employee normally would have earned during the period.

436.26 Any claim made by a postal employee or his or her authorized agent or attorney for back pay must be submitted to the appropriate office within 6 full years after date such claim first accrued.

As you can see from Part 436.11, any termination or reduction in "the basic compensation, allowances, differentials and employment benefits ..." is subject to the "Back Pay" controlling regulations. Moreover, in March of 1990, Management further clarified the definition of Back Pay (and what was excluded from Back Pay) through publication of Management Instruction EL 430-90-2 (Dated 3-15-90)²:

¹ Attachment #1

² Attachment #2

II. Overview

A. Scope

1. Definition of Back Pay. Back pay represents the restoration of all or any part of pay and/or employment benefits, authorized by an appropriate authority, for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials and/or employment benefits which an employee normally would have earned during the period.
2. Not Included in Back Pay. The term back pay does not include noncompensation related claims. A noncompensation related claim is defined as any claim which is not directly associated with basic compensation, allowances, differentials, and/or employment benefits such as employee claims filed under Article 27 of the applicable collective bargaining agreements and ELM 640.

The Management Instruction then went on to clarify and define "Unwarranted and Unjustified Personnel Actions":

D. Definitions

1. Unwarranted or Unjustified Personnel Action. Includes both personnel and pay actions (alone or in combination) as well as the omission or failure to take an action or to confer a benefit. Such actions may include, but are not limited to, separation, removal, suspension, demotion, reduction in pay, failure to promote in accordance with Postal Service policy or procedures established through the Collective Bargaining process, failure to reemploy a career employee who had reemployment rights, and a resignation which is subsequently determined to have been coerced.

These aforementioned all encompassing definitions can be interpreted to include virtually all employment circumstances in which an employee does not receive monies or benefits to which he or she is entitled and those cases in which monies are improperly collected.

Some examples of such circumstances are:

- * Working in higher level position, but receiving lower level pay;
- * Not receiving night differential;

- * Not receiving Sunday Premium Pay;
- * Not receiving Holiday Scheduling Premium Pay;
- * Not receiving Out of Schedule Premium Pay;
- * Not receiving Overtime Pay;
- * Not receiving Proper annual or sick leave accrual
- * Not receiving periodic Step Increases;
- * Improper Step withholdings (except due to unsatisfactory service 436.25);
- * Not receiving guaranteed work hour minimums;
- * Not receiving basic salary increases;
- * Not receiving cost of living adjustments;
- * Not receiving protected salary rates (saved grade/rate)
- * Not receiving Holiday Pay;
- * Reduction in Level;
- * Failure to promote Part-Time Flexible to Regular;
- * Collection of debts without demand letters;
- * Collection of debts through Letters of Demand without inclusion of proper appeal rights and options.

When a determination is made that an employee was entitled to monies or benefits, we must utilize Part 436.26 to initiate our claim:

436.26 Any claim made by a postal employee or his or her authorized agent or attorney for back pay must be submitted to the appropriate office within 6 full years after date such claim first accrued.

A letter-certified mail, return receipt requested-must be sent to the installation head advising of the claim and of the shop steward or local officer as authorized agent. The following is an example of the letter.

Dear Postmaster _____:

I am writing to you in accordance with Part 436.11 and 436.26 of the Employee and Labor Relations Manual as the authorized agent for _____ (member's name) _____. This claim for Back Pay is necessitated by the fact that _____ (#1 Example: On January 5, 1987, \$384.30 was improperly collected from Clerk Doe; #2 Example: Clerk Doe did not receive her periodic Step Increase as scheduled on June 18, 1988; Example 3: Clerk Doe did not receive night differential pay for the period October 30, 1988 to February 25, 1989.) _____

We are requesting that you take the appropriate corrective action in accordance with Part 436.3 of the Employee and Labor Relations Manual to ensure that Clerk Doe receives Back Pay (in the amount of) _____ (for the period previously stated).

Your attention and consideration to this important matter is appreciated. Please respond within ten calendar days.

Again, the letter must be sent certified, return receipt requested. With the letter, we have started the clock for the USPS response. Should the Installation Head respond, and more than likely such a response will be a denial, we have fourteen days to grieve the denial. Should we receive no response within the ten days, we should file a grievance within fourteen days of Management's receipt of the claim.

Utilizing the previously mentioned strategy, we can obtain pay and benefits for members even when grievances were not filed within fourteen days of when the actions occurred, or did not occur. In this way, I believe we can overcome the usual Management contention that our grievance requesting pay for what occurred in the past is untimely.

There have been several arbitration awards in support of our contentions that Part 436 of the Employee and Labor Relations Manual must be applied in conjunction with Article 15's fourteen day time limit. In these cases, Management argued that the fourteen day time limit was controlling, yet the arbitrators found that 436 was compatible with Article 15 and not in conflict. The arbitral reference is as follows:

ARBITRATOR LEVIN, CASE NUMBER N7V-IN-C 3452, PAGES 4-6

While Article 15 of the National Agreement clearly sets forth time limitation for the filing of grievances and provides that the failure to adhere to such time limitation constitutes a waiver of the grievance, this case has a unique feature in that Section 436 of the Employee and Labor Relations Manual also has a bearing on the dispute. Article 19 states that nothing in the Postal Service Handbook may conflict with the Agreement. The question, therefore, is does Section 436 conflict with the National Agreement? Article 15 of the National Agreement defines a grievance as follows:

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment...

The Arbitrator finds that Section 436 does not conflict with this definition of a grievance, but merely enlarges on the area of wages and provides for a more liberal procedure related to backpay, which is not specifically covered by the definition. Therefore, Article 19 and Section 436 are compatible with one another rather than in conflict. The area of backpay is given special consideration in Section 436 and the time for making a claim is extended to within 6 full years after the date such claim first accrued.

Whether or not Section 436 in its entirety is applicable to the claim for back pay is a matter to be determined after an examination of the merits of the claim.

Accordingly the Arbitrator finds that the refusal of the Postal Service to comply with the requirement of Section 436 of the Employee and Labor Relations Manual is a proper grievance and is governed by the language of that section.

ARBITRATOR ZUMAS, CASE NUMBER E7T-2E-C 14226, PAGES 2, 5, & 6-7

This grievance, filed on August 25, 1988, was originally filed as a claim for out of schedule pay (being assigned from Tour 2 to Tour 1) and higher level pay (performing Level 5 work on Tour 1) commencing on June 5, 1987. The Service denied the grievance at all levels contending that it was untimely filed.

At the hearing and in its post-hearing brief, the Union took the position that this was a contractual claim for back pay under Chapter 436 of the ELM, and that the 14 day requirement under Article 15 had no application. With respect to this contention, the Service argued that the back pay provisions of Chapter 436 of the ELM have no application because such claims are limited to removal actions. ...

After review of the record, it is this Arbitrator's finding that this Grievance is arbitrable and must be sustained on the merits. Accordingly, Grievant, who has since retired, shall be entitled to the difference between what he was paid as Level 2 Custodian and what he should have been paid, commencing May 23, 1983. ...

2. It is clear from this record that the Grievant's right to claim back pay accrued at the end of the two year salary protection (or Pay Period 19, 1981.) However, for some inexplicable reason, Grievant's salary protection continued until May 28, 1983, when a Form 50 was cut reflecting a pay adjustment, reducing Grievant's salary. Thus, Grievant became adversely affected as of May 28, 1983.

3. Inasmuch as this Grievance was filed within the six year period from the time Grievant was adversely affected, the matter is arbitrable. Moreover, for the reasons set forth above, Grievant is entitled to appropriate relief.

ARBITRATOR ORKIN, CASE NUMBER E7C-2E-C 43409, PAGE 2

... To answer this question, I must first state that I do not perceive a conflict between ELM 436 and the CBA. Courts utilize the concept of "Statutory Construction", i.e., the interpretation of two or more statutes taken as a whole. I shall do the same. The grievant may have other rights under

law to seek back pay claim; I can not adjudicate them. My sole duty is to interpret her rights under the CBA and appropriate regulations.

The clear, expressed language of ELM 436.26 allows for submission of a back pay claim by the employee or an authorized agent within six years of the accrual of the claim. If the remedy for such claim is to be a grievance arising from the CBA, the grievance must be timely filed in accordance with Section 2, Step 1,(a) which reads in part: "Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within 14 days of the date on which the employee or the union first learned, or may reasonably have been expected to have learned of its cause." (emphasis added.) the language appears absolutely clear in that a grievant may file when he or she could reasonably be expected to learn of his or her rights.

Management has the authority to unilaterally alter and clarify the language of the ELM should it decide that it would be appropriate in the future. The grievant's only present possible remedy results from the CBA. There is an overall six year statute of limitations, with a fourteen day window in which to file - that window beginning at a point in time when the employee learns or may reasonably be expected to learn of grounds for a grievance. These requirements were satisfied. The present clear wording of both ELM 436 and the CBA requires that I find the grievance was timely filed.³

The full texts of the decisions are available from my office.

As we have seen, there have been numerous times when members will come forward long after the fourteen day grievance limit and relate how some Manager either collected monies or refused to pay wages or benefits. Part 436 of the Employee and Labor Relations Manual must be utilized for these occasions. So long as we grieve either (1) the Installation Head's denial of the claim or (2) the failure of the Installation Head to respond to the claim, we will be timely in our grievance concerning the claim.

Because a member did not know he/she could challenge a Manager taking away monies or benefits must not prevent recovery and industrial justice at a later time. This report is meant to promote such recovery and give members back that justice.

³ NOTE: The Orkin decision is from the Expedited Panel and as such cannot be cited in another hearing. Its purpose here is for background on the issue.

I have also included a list of previous reports I have produced. If you need any of the arbitral references contained in this report or would like a copy of another report, please contact me at:

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Yours for democracy in our union,



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National Business Agent
Clerk Craft

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OPEIU #2
afl-cio



Management Instruction

Date Issued 3/15/90	Filing Number EL-430-90-2
Effective Date Immediately	Obsolete N A
Originating Organization & OCC Code Employee Relations Department ER113	
Title Back Pay	Signature & Title Joe S. Mosch Assistant Postmaster General, ER

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I. Purpose

The basic policy for Back Pay appears in the Employee and Labor Relations Manual (ELM) 436. This Instruction provides the procedures for processing back pay claims. Certain information contained in ELM 436 is repeated here for convenience only and is not intended to replace or alter the policy provided for in ELM 436.

II. Overview

A. Scope

1. *Definition of Back Pay.* Back pay represents the restoration of all or any part of pay and/or employment benefits, authorized by an appropriate authority, for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and/or employment benefits which an employee normally would have earned during the period.

2. *Not Included in Back Pay.* The term back pay does not include noncompensation related claims. A noncompensation related claim is defined as any claim which is not directly associated with basic compensation, allowances, differentials, and/or employment benefits, such as employee claims filed under Article 27 of the applicable collective-bargaining agreements and ELM 640.

B. Coverage

This Instruction covers employees and former employees of the United States Postal Service as well as individuals who were denied employment in the Postal Service.

C. Time Limitation

A back pay claim made by an employee or his or her authorized agent or attorney must be submitted to the appropriate office within 6 years after the date such claim first accrued.

D. Definitions

1. *Unwarranted or Unjustified Personnel Action.* Includes both personnel and pay actions (alone or in combination) as well as the omission or failure to take an action or to confer a benefit. Such actions may include, but are not limited to, separation, removal, suspension, demotion, reduction in pay, failure to promote in accordance with Postal Service policy or procedures established through the collective-bargaining process, failure to reemploy a career employee who had reemployment rights, and a resignation which is subsequently determined to have been coerced.

2. *Decision Award.* An adjudication by an appropriate authority as to whether the personnel action involved in a back pay claim was, in fact, unjustified or unwarranted.

3. *Settlement Agreement.* A negotiated resolution of a back pay claim between the Postal Service and the employee and/or his or her authorized agent or attorney, without requiring an admission of wrongdoing on the part of either party. A settlement agreement can also be a negotiated resolution of a back pay claim between the Postal Service and a postal union. The terms of a settlement agreement are binding unless specifically prohibited by statute, law, or regulation.

4. *Rescission.* The unilateral cancellation of an action by the Postal Service.

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435.24 Allowance to Age Over 40. The employee's basic allowance is increased by 10% for each full year and by 2 1/2% for each 3 full months in excess of a full year that the employee's age exceeds 40 years at the time of separation. For example, if the employee's age at the time of separation is 42 years and 7 months, the basic allowance computed in 435.23 above is increased by 25% (10% for each of the 2 years in excess of 40, and 2 1/2% for each of the two full 3-month periods in excess of the 2 full years).

435.3 Pay Rate and Duration

435.31 Form 50 Information. The Remarks section on separation Form 50 contains the total amount of severance pay due, the amount of the weekly payments, and the date of the first and last payments.

435.32 Amount and Intervals. Employees receive severance pay each bi-weekly pay period in the amount of twice their basic weekly compensation less withholding for taxes. The severance pay continues until (a) the severance pay fund is exhausted or (b) the employee is reemployed by the USPS or another federal agency - whichever occurs first.

435.4 Effect of Reemployment

435.41 Permanent Employment. If an employee who is receiving severance pay is reemployed by the USPS or another federal agency, the employee is recredited with the portion of creditable service covered by the balance of severance pay fund.

435.42 Temporary Employment. If an employee who is receiving severance pay accepts a time-limited federal or postal appointment, severance pay is suspended for the duration of the appointment. Upon termination, severance pay is resumed until the severance pay fund is exhausted. The time which the employee served under the limited appointment is not creditable for purposes of computing the severance pay it interrupts.

436 Back Pay

436.1 Corrective Entitlement

436.11 An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and employment benefits which the employee normally would have earned during the period.

436.12 For purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect.

436.2 Limitations

436.21 Any amount which the employee earned in a new employment or in an enlarged part-time employ-

ment to replace Postal Service employment must be determined and offset against the amount of the reimbursement to which she or he would be entitled.

436.22 Back pay is allowed, unless otherwise specified in the appropriate award or decision, provided the person has made reasonable efforts to obtain other employment.

436.23 No back pay is allowed for any period during which the person was not ready, willing, and able to perform the duties of the postal position.

436.24 Leave which is recredited as a result of the corrective action may not exceed the maximum amount of leave to which the employee was eligible.

436.25 The employee is not entitled (a) to increases in pay resulting from deferment of step increases due to unsatisfactory service or (b) to salary increases resulting from ranking action.

436.26 Any claim made by a postal employee or his or her authorized agent or attorney for back pay must be submitted to the appropriate office within 6 full years after date such claim first accrued.

436.3 Corrective Action

The installation head, or other appropriate authority, determining that a previous decision was unjustified or unwarranted, initiates and directs the corrective action to be taken to assure appropriate earnings to the employee for the period affected.

436.4 Documents in Support of Claim

436.41 Statements by Local Official

436.411 The local official must provide a tabulation of the number and type of pay hours with which the employee should have been credited during the back pay period, including any annual or holiday leave taken.

a. Overtime hours and/or night differential, as applicable, are determined by averaging the number of hours that other employees of the office with the same employment status were assigned during the back pay period.

b. If the claim is for a part time flexible employee, a tabulation must be provided which shows the number and type of pay hours the employee experienced for a full 13 pay periods prior to the separation or suspension. If the back pay period is less than one full pay period, only a 6 pay period tabulation is required.

436.412 The local official must provide a statement indicating whether the employee is entitled to the following during the back pay period:

- a. Premium pay (see 434).
- b. Change in pay rate or salary schedule.
- c. Step increase and date effective.
- d. Change in leave category and date effective.
- e. Other changes in pay of a general application. 9

REPORTS BY JEFF KEHLERT

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The following reports are available, upon request, from my office:

1. **Sky's the Limit**
Produced with former National Business Agent for the Maintenance Craft, Tim Romine. This report addresses our ability to obtain "restricted" forms of documentation necessary for enforcement of the Collective Bargaining Agreement with particular emphasis on medical records/information.
2. **Your Rights in Grievance Investigation and Processing**
An alphabetical compilation of Step 4 Interpretive Decisions on shop stewards' rights and related subjects.
3. **More Rights in Grievance Investigation and Processing**
A second volume of the Your Rights report including numerous Step 4 decisions.
4. **Grievances in Arbitration**
A compilation of arbitration decisions on various subjects with a brief synopsis of the awards included.
5. **Vending Credit Shortages and Other Issues**
A report on multiple subjects including the title subject, use of personal vehicles, Letters of Demand, etc.
6. **Letters of Demand - Due Process and Procedural Adherence**
A history in contractual application of the due process and procedural requirements of the Employer in issuing Letters of Demand including numerous arbitration decision excerpts and the application of the principle of due process to discipline.
7. **Ranking Positions to a Higher Level**
Utilization of Article 25 and Employee and Labor Relations Manual Part 230 to upgrade Bargaining Unit Positions to Higher Levels based upon work being performed. (With authoritative arbitral reference.)
8. **Winning Claims for Back Pay**
Applying Part 436 of the Employee and Labor Relations Manual in conjunction with our Grievance Procedure to obtain denied pay and benefits, up to six years in the past.
9. **Letters of Demand -- Security and Reasonable Care**
As Management corrects due process and procedural errors when issuing letters of demand, we must turn to other methods of prosecuting grievances for alleged debts. This report addresses F-1 and DMM regulations to enable us to prove security violations exist.
10. **Surviving the Postal Inspection Service**
This report brings together the crucial information (Situations, Questions and Answers, National APWU Correspondence) necessary for employees and shop stewards on what rights must be utilized when Postal Inspectors come calling. Its goal is to enable Postal Workers to Survive and not lose their livelihood.
11. **Out-of-Schedule Compensation, Strategies for Winning Pay When our Collective Bargaining Agreement is Violated.**
This report places into a readily accessible package the controlling Collective Bargaining Agreement provisions, arbitral reference, contractual interpretation and strategies necessary to pursue violations of the National Agreement in which out-of-schedule compensation would be an appropriate remedy.
12. **A Handbook: Defense vs. Discipline: Due Process and Just Cause in our Collective Bargaining Agreement**
The arguments, Collective Bargaining Agreement references, investigative interviews, and arbitral authority brought together to provide the best possible defenses when discipline is issued.